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74-154

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

JOHN MARTINEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Martinez prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 18, 1974.

## OPINIONS BELOW

The District Judge did not file an opinion except for an unreported memorandum opinion denying a pretrial motion to suppress evidence. That Opinion is printed as Appendix "A", *infra*. The Opinion of the Court of Appeals is not yet reported. It is printed as Appendix "B", *infra*.

## JURISDICTION

The Judgment of the Court of Appeals was entered on June 18, 1972 (Appendix "C", *infra)*. A timely Petition for Rehearing was denied on July 23, 1974, by an order which is printed as Appendix "D", *infra*. Jurisdiction is conferred upon this Court by 28 USC 1254.

## QUESTIONS PRESENTED FOR REVIEW

I.

Where a defendant is tried on an indictment charging two substantive offenses which, in part, are the overt acts alleged in a third count of conspiracy to violate the same law, and the government fails to prove the conspiracy charge, is the defendant entitled to a new trial on the substantive counts where substantial hearsay evidence was admitted against him only on the basis of the conspiracy count?

II.

Where a wiretap is authorized to intercept messages of a named Ohio gambler "and others as yet unknown" to and from designated telephones in Ohio and, prior thereto, government agents, through surveillance of Petitioner and reference to telephone records, establish probable cause to believe that Petitioner is a Las Vegas gambler who has telephoned gambling information to the Ohio telephones, is Petitioner entitled to have the wiretaps of his conversations suppressed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?

III.

Where an application for judicial approval to intercept wire communications fails to disclose that the Attorney General authorized the application, and the only evidence that he did is the *ex parte* affidavit of the Attorney General's executive assistant, is the defendant, upon challenging the truthfulness of the affidavit, entitled to an evidentiary hearing on that issue?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

United States Constitution, Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the wit-

> nesses against him; to have compulsory process for obtaining witnesses in his favor . . .

18 USC 2516 and 2518 are set forth in appendix F, *infra.*

## STATEMENT OF THE CASE

### I.

Petitioner was tried by a jury on a three-count indictment which charged, first, that between March 8 and November 25, 1969, he used and caused to be used telephone facilities to transmit gambling information between Ohio and Nevada in violation of 18 USC 1084; second, from March 8 through November 25, 1969, he used and caused to be used a telephone between Ohio and Nevada to promote an illegal gambling business in violation of 18 USC 1952; and, third, that from March 8 to November 25, 1969, he conspired with certain other named individuals to violate 18 USC 1084 and 1952.

During the trial, the government, under the hearsay exception permitted in conspiracy trials, put before the jury evidence which would have been inadmissible without the conspiracy count. The jury heard a number of intercepted telephone calls in which Petitioner was not a participant; records of over 160 calls to various individuals in the Las Vegas area were admitted only under the conspiracy theory; the fact of these calls was argued to the jury by the government as evidence of Petitioner's guilt; and multiple hearsay statements attributed to alleged co-conspirators were introduced to incriminate Petitioner.

The jury acquitted Petitioner of the conspiracy count but convicted him of the two substantive offenses.

II.

In a pretrial motion to suppress, Petitioner complained that he was not named in the applications and orders for wiretaps. The first order of the Ohio District Judge, dated October 2, 1969, authorized intereception of the communications of Joseph Spagnolo "and unknown others", covering six Cleveland telephones including 861-4756. Based in part upon information gleaned from this wiretap, the government applied for and received a second order dated November 6, 1969, authorizing interception of telephone communications of Raymond Paul Vara "and others as yet unknown" to and from two telephones in Youngstown, Ohio, registered in the name of a third party but alleged by the government to "have been used and are being used by Raymond Paul Vara" in connection with the commission of violations of 18 USC 1084, 1952, and 371.

On a hearing of Petitioner's pretrial motion to suppress the wiretaps, the government attorney represented to the Court:

> Nor was there any knowledge back at that time that Mr. Martinez was using the phone. As far as the government knows, that was not alleged in the affidavit, that Mr. Martinez was using the phone at that time.
>
> In fact, I don't think that it should be included in the application and the order unless the Court can find that there is probable cause that Mr. Martinez is using the phone. In other words, he should not be included in the order or in the application for the wiretap unless we can show probable cause that he is using the phone.
>
> We may perhaps have an idea that he might be using the phone. I'm not saying that we do. I

> wasn't in on the case at that time, and I don't know whether or not there was any hint that he was even using the phone. I doubt that there was because it might have been put in the application if there was. But even if there is an idea that he might have been using this phone in the way that we have alleged, unless we can show that there is probable cause, in other words, more than a hint that he is using the phone, that is not evidence that should be considered in the affidavit that is attached to the application and on which the order is based. [Page 137 of Appendix in the Court of Appeals.]

In fact, a later-disclosed affidavit by F.B.I. agent John Norris, Jr., filed in the United States District Court in Nevada to establish probable cause for a warrant, gave details of an investigation in Las Vegas of Petitioner from May, 1968, until the date of the affidavit, November 25, 1969. The affidavit, set out in full as Appendix "E", *infra,* disclosed that from May to December, 1968, there were numerous phone calls between Petitioner and Raymond Paul Vara in Canton, Ohio, and on September 5, 1969, Petitioner was observed dialing a ten-digit number from a public telephone in Las Vegas and depositing at least four coins. He was overheard to give out the line on pitchers and on total points. Telephone company records indicated a toll call from the public telephone used by Petitioner to Cleveland telephone 861-4756.

## III.

The applications for wiretaps identified Assistant Attorney General Will Wilson as the officer who had authorized them. Petitioner challenged the procedure which the

government used, asserting that neither the Attorney General nor Will Wilson had in fact authorized the applications. In response, the government filed affidavits which disclosed that Will Wilson did not authorize the application.

It was the government's position that the application had in fact been authorized by former Attorney General John Mitchell. In support of this claim, the government relied upon an affidavit of Sol Lindenbaum, the executive assistant to the Attorney General, which read in pertinent part:

> On September 22 and November 5, 1969, Attorney General John N. Mitchell approved requests for authorization to make application for interception orders with respect to certain telephones in Cleveland and Youngstown, Ohio. Attached are copies of the Attorney General's personally initialed memoranda of those dates to Will Wilson, reflecting his favorable actions on the request.

No affidavit by Mr. Mitchell was submitted.

Petitioner requested and was refused an evidentiary hearing to determine whether Mr. Lindenbaum's affidavit was accurate and whether the initials JNM on the memoranda to which the affidavit referred were in fact the initials of Attorney General Mitchell.

## REASONS FOR GRANTING THE WRIT

### I.

**THE JURY HAVING HEARD A MASS OF HEARSAY EVIDENCE UNDER THE CONSPIRACY COUNT OF WHICH PETITIONER WAS EVENTUALLY ACQUITTED, HE IS ENTITLED TO A NEW TRIAL ON THE TWO SUBSTANTIVE COUNTS OF WHICH HE WAS CONVICTED.**

In his perceptive concurring opinion in *Krulewitch vs. United States*, 336 US 400, 457 (1949), Justice Jackson said:

> . . . statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges.

Here, the government had no reason—no legitimate reason, at least—to charge a conspiracy which covered the same time period as the substantive counts; the overt acts were part of the substantive counts; and the object of conspiracy was accomplishment of the two substantive offenses charged. Prosecution on the substantive counts —either or both of them—would have been adequate.[1]

---

[1] The inclusion of a conspiracy charge was the deliberate choice of the government. Petitioner was originally indicted along with a number of others in a multiple-count indictment tied together under Rule 8 FRCrP only by a conspiracy count. Cf. *Kotteakos v. United States*, 328 US 750 (1945). In the superseding indictment upon which Petitioner was tried alone, the conspiracy count was retained to gain the advantage of the hearsay rule of conspiracy trials.

Justice Jackson added, 336 US at 457:

> . . . There should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate, and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

This Petition presents the Court with an opportunity to consider a desirable corollary to Justice Jackson's principle—there should be no straining to uphold a conviction of a substantive offense obtained through the use of massive hearsay testimony admitted only under an unproved conspiracy charge. Such a rule—simple and certain in application—would be an effective deterrent to the reflex-like action of some government prosecutors in adding a needless conspiracy count.

As far as we know, there are only two cases applying this principle: *United States vs. Johnson,* 334 F Supp 982 (WD Mo 1971),[2] and *United States vs. Lucido,* 486 F 2d 868 (CA 6, 1973).

Inherent in the question we tender to the Court is a procedural problem. *Lucido* was decided after Petitioner's case was briefed but before it was decided. Petitioner brought the *Lucido* case to the attention of the Court before decision and requested the Court to consider the issue. The opinion of the Court did not address itself to the point, and it was raised again by Motion for Rehearing. In denying the Motion for Rehearing, the Court of Appeals said:

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[2] Affirmed on other grounds, 462 F 2d 608 (CA 8 1972).

> ... the court concludes that the matters referred to in said petition [for a rehearing] were *considered* and correctly decided . . . (Appendix "D", *infra.)*

In *Davis vs. United States,*——US——(decided June 10, 1974), 42 LW 4857, 41 L ed 2d 109, it was held that after a defendant had lost his appeal, he could litigate a non-constitutional issue in 28 USC 2255 proceedings, based upon an intervening decision of the Court of Appeals. It should follow that the intervening decision should be considered by the Court while the case is still on direct appeal.

In tendering this question to the Court, we do not seek to resolve a conflict between circuits nor even a conflict between panels of the same circuit.[3] Nor do we ask the Court to review a question turning upon subtle factual difference between two cases.

Even if this Court should conclude, as the Court of Appeals seemed to rule, that the facts of Petitioner's case are distinguishable from those in *Lucido*, it could and should address itself to the issue presented in this Petition.[4] The question is important to the administration of justice and the rule we contend for should have more solid support than the lonesome decision of a District Judge in Missouri and the sometime rule of the Sixth Circuit.

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[3] Two judges of the panel which decided *Lucido* were on the panel which decided Petitioner's case below.

[4] Of course, we perceive no distinction between the two. Petitioner's conviction should be sustained only if Rule 52 would pardon the admission of the hearsay as harmless error in a prosecution for the substantive offenses only.

## II.

**HAVING LEARNED THAT PETITIONER WAS VIOLATING FEDERAL ANTIGAMBLING LAWS AND WAS CONVERSING ON THE PHONES SOUGHT TO BE TAPPED, THE GOVERNMENT WAS REQUIRED TO INCLUDE HIS NAME IN THE APPLICATION.**

In *United States vs. Kahn,* ——US——, (decided February 20, 1974), 42 LW 4245, 39 L ed 2d 225, it was held that the government is not required to conduct a thorough investigation to learn the identity of persons likely to use a telephone for illegal activities before applying for an order authorizing interception of communications.

The issue which we tender is whether, having conducted an investigation which establishes probable cause to believe that an individual is engaged in illegal activity and in connection with that illegal activity is calling to the phones sought to be tapped (Appendix E, *infra),* the government is required to identify him in the application and have him identified in the order authorizing telephone taps.

## III.

**PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON THE DISPUTED FACTUAL ISSUES SURROUNDING THE AUTHORIZATION OF THE WIRETAP APPLICATION.**

In *United States vs. Chavez,*——US—— (decided May 13, 1974), 42 LW 4660, 40 L ed 2d 380, it was held that suppression of wiretaps was not required simply because the application to the Court misidentified the authorizing official as an Assistant Attorney General rather than the Attorney General himself. Central to the Court's opinion

in *Chavez* was the fact that the respondent there did not challenge the truthfulness of the Attorney General's affidavit that he had personally authorized the wiretaps.

> With respect to the Chavez tap, the Court of Appeals assumed, as had the District Court, that the Attorney General had personally approved the request for authority to apply for the interception order, as his affidavit stated. *Chavez, supra,* at 42 LW at 4661.

We do not ask the Court to reassess its holding in *Chavez.*

In the trial court we challenged the truthfulness and the accuracy of the conclusionary affidavit of Sol Lindenbaum and noted the absence of an affidavit from the Attorney General himself. Here, we challenge the ruling of the District Court to decide the important factual question on the basis of *ex parte* affidavits and without an evidentiary hearing.

In this respect, the ruling below conflicts with the 1973 rulings of the Fifth Circuit in *United States vs. Bowdach,* 474 F 2d 812, and *United States vs. Robinson,* 472 F 2d 973, that an evidentary hearing is required.

The course of proceedings in those cases is interesting and instructive. On remand, the two cases and several others were consolidated for an evidentiary hearing before Judge Mehrtens in the Southern District of Florida. Following the hearing, at which both Attorney General Mitchell and Sol Lindenbaum testified, Judge Mehrtens concluded that the Attorney General had not authorized the wiretaps, and he ordered their suppression. *United States vs. Robinson,* 359 F Supp 52. Reviewing the record made before Judge Mehrtens, another District Judge concluded that, with reference to other taps, the Attorney General

had approved the application and denied suppression. *United States vs. Bowdach,* 366 F Supp 1368. The important fact is that each defendant was afforded a full evidentiary hearing on the issues.[5]

It may well be that on factual issues not bearing upon the accused's guilt he is not in all cases entitled to an evidentiary hearing. Certainly he should be required to make some showing to a court before it would require the Attorney General and his executive assistant to attend a court hearing distant from Washington and subject themselves to cross-examination. But here, the showing was made by the government for the necessity of a hearing. They supplied affidavits to the Court which showed that the original applications for wiretap orders misrepresented the person who had approved the applications. *Chavez* said that this misrepresentation is insufficient reason to suppress the wiretaps but what *Chavez* leaves unanswered and which should be answered by this Court is whether such misrepresentation is sufficient reason to entitle a defendant, upon his request, to an evidentiary hearing.

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[5] Mr. Lindenbaum's conclusionary affidavit in our case takes on new meaning in the light of his Florida testimony. Consider the following excerpt:

> Q. On how many occasions, sir, in 1969, 1970, and 1971, did you affix Mr. Mitchell's initials to those designation memorandums?
>
> A. I don't know. I don't have a count. Let me say this: I include in that, not only ones that I may have affixed *personally* by my hand but those which I had put on by one of his secretaries.
>
> Q. One of his secretaries puts his initials there?
>
> A. Sometimes, that's correct.
>
> Q. At your direction?
>
> A. At my direction. (Emphasis supplied.)

## RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted. Should the Court not be prepared to address itself to these issues in full opinion, at least there should be a remand for an evidentiary hearing.

Respectfully submitted,

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## APPENDIX A

## MEMORANDUM OPINION AND ORDER

Filed November 1 11:32 AM '72

No. CR 72-424

Contie, D.J.

This cause came on to be heard on the motion of the defendant to suppress certain evidence obtained through telephone interception under the provisions of Title 18, USC 2510. The motion made by the defendant is as follows:

1. To suppress any recording of the voice of the defendant intercepted by electronic means.

2. To suppress any recording obtained of the voice of the co-defendant or co-conspirator.

The mover also suggests that Title 18, USC 2510 is unconstitutional.

The Court has reviewed *United States* v *Whitacre,* Criminal No. 70-324. The Court is aware that all prior determinations made by other circuits have found that Title 18, USC 2510 is constitutional. The Court is of the opinion that Title 18, USC 2510 is constitutional and does not violate the Fourth Amendment of the Constitution.

The defendant further argues that the order was not initially placed on his phone and, therefore, any recording of information obtained by interception of a phone conversation that he had with another individual whose phone was tapped in accordance with Title 18, USC 2510 should not be admitted in the case in which he is a defendant.

The Court finds that the failure to name defendant Martinez in an order to tap another phone does not invalidate the intercepted phone conversation of Martinez.

The Court further finds that the procedures of obtaining the order against the phones in question in the within action were proper in all respects and were in compliance with Title 18, USC 2510.

The Court is of the opinion that motion requesting the suppression of voices of co-defendants or co-conspirators should be denied for the reason that defendant has no standing to complain relative to conversations with which he was not a party. *Jones* v *United States,* 362 US 257; *Alderman* v *United States,* 394 US 165.

It Is So Ordered.

/s/ Leroy J. Contie Jr.
United States District Judge

## APPENDIX B

## OPINION

Decided and Filed June 18, 1974

Before: Phillips, Chief Judge; Edwards and Lively, Circuit Judges.

Lively, Circuit Judge. John Martinez was found guilty on two counts of an indictment charging him with violation of 18 U.S.C. §§ 1084 and 1952, illegal use of interstate telephone facilities to carry on unlawful gambling activities. No issue is made as to the sufficiency of the evidence or of rulings on evidentiary matters during the trial. Therefore, no purpose would be served by a recitation of the facts disclosed by the trial transcript. It is maintained on appeal, however, that there are three distinct reasons why the conviction must be reversed. These matters will be considered separately.

### The Speedy Trial Issue

Appellant maintains that he was denied his Sixth Amendment right to a speedy trial. An indictment was returned on April 2, 1970 charging Martinez and 14 others with violation of 18 U.S.C. §§ 1084 and 1952 and with conspiracy. Between the date of the indictment and May 18, 1972 thirteen of the original fifteen defendants pled guilty. On May 18, 1972 Martinez and one other person were charged with the same crimes in a superseding indictment. Subsequently the co-defendant in the superseding indictment pled guilty and Martinez was the only person actually tried on either indictment. The original indictment was dismissed by the government at the time that the trial of Martinez began under the superseding indictment. The trial began on

November 27, 1972, which was nearly 32 months after the original indictment was returned.

The reasons for delay in bringing appellant's case to trial are not apparent from an examination of the record. So far as the record discloses, the government never made a motion for continuance and appellant never sought to have his case set for trial. The minutes of a pretrial hearing held on February 11, 1971 show that no motions were pending at that time. On May 3, 1971 there was a motion for continuance by one of the co-defendants and there is no indication that the motion was opposed by the government or any of the other defendants. Martinez was free on bail during the entire period that his case was pending. On November 27, 1972, the date that his trial began, defendant orally moved the court to dismiss the charges for failure to provide him with a speedy trial.

Appellants cites *Barker* v. *Wingo,* 407 U.S. 514 (1972). In that case the Supreme Court rejected a rule which would require that the defendant either demand a speedy trial or forever waive the right to raise the issue. The Court held, however, that a defendant has some responsibility to assert a claim for a speedy trial, but placed ". . . the primary burden on the courts and the prosecutors to assure that cases are brought to trial." 407 U.S. at 529. The Court specifically adopted "a balancing test." It also identified four factors among those which should be considered by a court in determining an issue of speedy trial and concluded that such cases must be approached on an *ad hoc* basis. We have considered these four factors. Admittedly the length of delay was quite great in the present case. However, a complex conspiracy was originally charged, and the various maneuverings which eventually led to guilty pleas by 14 of those indicted were necessarily time

consuming. Although appellant has claimed prejudice by reason of the delay in bringing his case to trial, this was done in most general terms without any supporting proof. While it was claimed that a witness who would have been helpful to him died during the pendency of the case, no attempt was made to show what the testimony of this witness would have been. Likewise, the defendant complained of the uncertainty of living under a cloud for this period of time, but he did not offer proof of any measurable damage which flowed from it. In concluding that the appellant John Martinez was not deprived of a constitutional right by the delay complained of, we particularly note that he did not file a motion to suppress wiretap evidence until July 21, 1972. Since he was convicted largely on the basis of evidence obtained by a telephone intercept order and had known of the existence of this evidence since early 1970, the fact that he waited until July 1972 to seek to have such evidence suppressed indicates that he was not overly concerned with getting his case to trial during the first two years of its pendency. Applying the balancing test mandated by the Supreme Court, we find that the circumstances of this case do not justify a dismissal of the charges against appellant because of the delay which occurred between the date of his first indictment and the beginning of trial on the superseding indictment.

### The Wiretap Authorization

The appellant contends that the Department of Justice failed to follow the prescribed procedures under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, for obtaining authorizations to tap certain telephones and intercept communications. Specifically, he maintains that the procedures set forth in 18 U.S.C. § 2516 for authorization of an application to a

federal judge for an order authorizing or approving a wiretap and the procedure set forth in 18 U.S.C. § 2518 for obtaining such an order were not followed.

Two separate orders were issued by the chief judge of the United States District Court for the Northern District of Ohio authorizing FBI agents to intercept wire communications of a named person "and others as yet unknown" to and from telephones described by their numbers. A lengthy affidavit which had been executed by an FBI agent familiar with the activities of the person named in the application as the user of the designated telephones accompanied each application. Since evidence from the October 22 wiretap order only was introduced, we confine ourselves to consideration of that order. Assistant Attorney General Will Wilson was identified as the officer who had authorized the application. The application and its exhibit indicated to the district judge that the authorization procedures prescribed by 18 U.S.C. §2516(1) and 18 U.S.C. § 2518(1) had been precisely followed. However, Martinez challenged the procedure which the government used, maintaining that there was doubt that either the Attorney General or a specially designated assistant attorney general had in fact authorized the application. In responding to this, the government revealed by affidavit that Assistant Attorney General Will Wilson had never examined the request for authorization, but that it had been examined in a special unit within the Department of Justice by attorneys whose primary function was to scrutinize such requests ". . . with particular emphasis on assuring strict adherence to the required statutory, judicial and Constitutional standards." After several reviews the request was forwarded to the "Office of the Attorney General with a detailed recommendation that the authorization be granted." The affidavit of Henry E. Petersen, who was then a deputy

assistant attorney general, stated that after the application had been approved "in the Office of the Attorney General," he signed Will Wilson's name to the letter to the requesting attorney authorizing him to make application to a federal judge for an interception order. This letter, bearing the name and apparent signature of Will Wilson, but actually prepared somewhere in the Criminal Division of the Department of Justice and signed by Petersen with Wilson's name "as a ministerial act" was filed with the district judge along with the application.

No affidavits were filed by former Attorney General John N. Mitchell. However, Sol Lindenbaum, who was the Executive Assistant to the Attorney General, both at the time the request in question was processed and at the time of the hearing on the motion to suppress, filed an affidavit in which he stated that Attorney General Mitchell approved the request for authorization to make application for interception orders concerning the telephones involved in this case and he attached copies of a memorandum prepared by the Attorney General addressed to Will Wilson reflecting his favorable action on the request. Near the top of the memorandum appeared the initials "JNM." After identifying the particular request for an application, the memorandum concluded with the following language:

> Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to authorize [the requesting attorney] to make the above-described application.

Congress required that each application for an order and each order authorizing or approving the interception of wire or oral communication identify the officer authorizing the application. 18 U.S.C. § 2518(1)(a) and (4)(d). Where

disclosure of information would be a violation of the Act, § 2515 prohibits use of evidence in certain proceedings. Furthermore, § 2518(10)(a) provides for motions to suppress the contents of any intercepted communication, or evidence derived therefrom, on the following grounds:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

The issues presented in this case were decided by the Supreme Court in *United States* v. *Chavez*, —— U.S. ——, 42 U.S.L.W. 4660 (decided May 13, 1974). On facts similar to those disclosed by this record, suppression of wiretap evidence was held not justified. In view of the fact that the Attorney General approved the application, the misidentification of the officer authorizing it was held not to render the order "unlawful" within the meaning of 18 U.S.C. § 2518(10)(a)(i). The Court further held that the misidentification "did not affect the fulfillment of any of the reviewing or approval functions required by Congress and is not within the reach of paragraphs (ii) and (iii) [of 18 U.S.C. § 2518(10)(a)]." Slip opinion, p. 12. The provisions of § 2515 do not require suppression under the circumstances of this case. The district court correctly denied the motion to suppress.

## The Constitutionality of Title III

Appellant contends that Title III offends the First, Fourth and Fifth Amendments to the Constitution of the United States. He further maintains that electronic surveillance is unconstitutional per se, and that wiretapping

can never constitute a reasonable search within the meaning of the Fourth Amendment. The issue of per se unconstitutionality of electronic surveillance was settled by the Supreme Court in *Katz* v. *United States,* 389 U.S. 347, 354-355 (1967), where it was held that a magistrate with proper information may constitutionally authorize a surveillance by wiretap under given conditions. See also *Osborn* v. *United States,* 385 U.S. 323, 329 330 (1966). Though the New York "Eavesdropping Law" was held unconstitutional in *Berger* v. *New York,* 388 U.S. 41 (1967), in pointing out the deficiencies of the New York statute the Court indicated the requirements for a constitutional electronic surveillance law. It is clear that Congress gave careful consideration to the opinions in *Osborn, Berger* and *Katz* in drafting 18 U.S.C. §§ 2510-2520, Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

A number of courts have considered Title III in the context of claims of unconstitutionality similar to those made by the appellant in this case. We agree with those courts which have held that the provisions of Title III which permit limited electronic surveillance to be conducted under strict judicial supervision satisfy the requirements of the Constitution. See *United States* v. *Bobo,* 477 F.2d 974 (4th Cir. 1973); *United States* v. *Cafero,* 473 F.2d 489 (3rd Cir. 1973); *United States* v. *Cox,* 462 F.2d 1293 (8th Cir. 1972); *United States* v. *Cox,* 449 F.2d 679 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

Appellant specifically contends that Title III does not provide adequate notice to those affected by a wiretap order to satisfy the Fourth Amendment. To require that affected persons be given notice prior to the commencement of electronic surveillance would render all such surveillance totally ineffective. The Fourth Amendment does not require prior, or even contemporaneous, service of a con-

ventional search warrant. *United States* v. *McKenzie,* 446 F.2d 949, 954 (6th Cir. 1971). As the Supreme Court pointed out in *Katz* v. *United States, supra,* neither the Fourth Amendment nor the Federal Rules of Criminal Procedure impose "an inflexible requirement of prior notice." 389 U.S. at 355-356, n. 16. We believe that the provisions of 18 U.S.C. § 2518(8)(d) which direct that an inventory be served upon the persons named in the order and others affected by it satisfy the Fourth Amendment requirement of notice.

Appellant further contends that the due process provisions of the Fifth Amendment are violated by the interception and use of communications of a person not named in the application or order. The record indicates that appellant's identity was known to the FBI prior to the time that the authorization was sought and that something was known of his contacts with the only person named in the application. The application sought authorization "to intercept wire communications of Raymond Paul Vara and others as yet unknown . . ." The government maintains that although it knew of appellant's existence at the time the application was made, he was included in the phrase "others as yet unknown" because at that time it was not known that he was using a telephone for an illegal purpose. Appellant lived in Las Vegas and the telephones which were tapped were in Ohio.

In *United States* v. *Kahn,* —— U.S. ——, 42 U.S. L.W. 4245 (decided February 20, 1974), the Supreme Court held that the government is not required to conduct a thorough investigation to learn the identity of every person who is likely to use a telephone for illegal activities before applying for an order authorizing interception of communications over the particular instrument. The term "as yet

unknown" may properly be applied to persons whose identity is known, but who the government has no probable cause to believe are involved in illegal use of communication facilities. Although Martinez was known as an acquaintance of Vara, his role in the interstate transmission of forbidden gambling information was first discovered by the interception of calls over the Vara telephone. Under these circumstances, he was not entitled to have the evidence suppressed for failure to name him in the application and order.

The judgment of the district court is affirmed.

## APPENDIX C

## JUDGMENT

No. 73-1740

UNITED STATES COURT OF APPEALS
for the Sixth Circuit
United States of America,
Plaintiff-Appellee,
v.
JOHN MARTINEZ,
Defendant-Appellant.
(Filed June 18, 1974)

Before: Phillips, Chief Judge; Edwards and Lively, Circuit Judges.

Appeal from the United States District Court for the Northern District of Ohio.

The Cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

Entered by order of the Court.

/s/ John P. Hehman
Clerk

## APPENDIX D

## ORDER

(United States Court of Appeals for the Sixth Circuit)

(Filed July 23, 1974)

| | |
|---|---|
| United States of America<br>Plaintiff-Appellee,<br>v.<br>John Martinez<br>Defendant-Appellant. | N. 73-1740 |

Before: Phillips, Chief Judge; Edwards and Lively, Circuit Judges.

No judge having moved for a rehearing en banc, this case has been referred to the panel which heard the appeal.

Upon careful consideration of the petition for rehearing filed herein by the defendant John Martinez, the court concludes that the matters referred to in said petition were considered and correctly decided by the court in its opinion.

It is therefore Ordered that the petition for rehearing of the defendant John Martinez be and it hereby is denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

## APPENDIX E

## AFFIDAVIT

United States of America
District of Nevada—ss.

The affiant being duly sworn, does hereby depose and say:

That my name is John A. Norris, Jr. and I have been a Special Agent of the Federal Bureau of Investigation since January 24, 1955, and presently serve in that capacity.

That during the past one and one-half years of my service as a Special Agent of the Federal Bureau of Investigation, I have been assigned to gambling investigations in the Las Vegas, Nevada, area. During this past one and one-half years, up to and including the present date, I have conducted numerous gaming investigations.

Investigation by other Special Agents of the Federal Bureau of Investigation at Canton, Ohio, and Las Vegas, Nevada, from May, 1968, to December, 1968, showed numerous telephone calls between the telephone of Raymond Paul Vara in Canton, Ohio and John Martinez in Las Vegas, Nevada.

On December 31, 1968, Special Agents of the Federal Bureau of Investigation executed two search warrants at the residence of Raymond Paul Vara at 3900 Royal Avenue, N.E., Canton, Ohio, one for the person of Raymond Paul Vara and the other for his residence. While searching the person and residence of Vara, the Agents found and

seized numerous wagering records and wagering paraphernalia, including but not limited to numerous basketball, college and other sports publications, including Ohio State Sports News Bown Football Schedules from December 14, 1968, to January 11, 1969, and one weekly football, college and other sports publications, including Ohio $2,600.00 in cash.

Examination of this material seized from Vara and his residence was made by the Federal Bureau of Investigation Laboratory. The examination showed this to be paraphernalia of the type commonly associated with professional gambling and bookmaking.

On February 13, 1969, John Martinez was interviewed at his residence, 2812 Richfield, Las Vegas, Nevada, by another Special Agent of the Federal Bureau of Investigation. Martinez said he is a very good friend of Paul Vara, Cleveland, Ohio, having known him for 35 years since they were boyhood friends in Cleveland. Martinez said he has had numerous telephone conversations with Vara, mostly of a personal nature. Martinez denied any gambling connections with Vara.

At 9:06 a.m. on September 5, 1969, an unknown male, subsequently identified through a photograph to be John Martinez, was observed at public telephone 385-9988 located in the Golden Nugget Casino, 129 Fremont, Las Vegas, Nevada. Martinez dialed at least ten numbers and deposited at least four coins and was overheard to give out the line on pitchers and on total points.

As the result of a subpoena *duces tecum* issued by the Federal Grand Jury, Las Vegas, Nevada, the Central Tele-

phone Company, on October 28, 1969, made available toll records for telephone 385-9988, which indicated a toll call to Cleveland, Ohio, telephone 861-4756.

Martinez was then surveilled to a 1968 Cadillac, 1969 Nevada license C-97066, which entered and drove west on East Carson Street, Las Vegas, Nevada.

Department of Motor Vehicles records indicate the 1968 Cadillac, 1969 Nevada license C-97066, is registered to John Martinez, 2812 Richfield Boulevard, Las Vegas, Nevada.

As the result of a subpoena *duces tecum* issued by the Federal Grand Jury, long distance toll records for telephone 870-6752 subscribed to by John Martinez,, 2812 Richfield Boulevard, were obtained on October 28, 1969, from the Central Telephone Company, Las Vegas, Nevada. These records indicate a toll call on September 2, 1969, to telephone 696-4085, Cleveland, Ohio, identified by Special Agents of that office to be located in the bookmaking office of Joseph Anthony Spaganlo in Cleveland, Ohio.

The 1968 Cadillac of John Martinez was observed at 2812 Richfield Boulevard, Las Vegas, as follows:

10:56 A.M., November 8, 1969;

during period 11:57 A.M. to 2:12 P.M., November 9, 1969;

during period 8:09 A.M .to 11:29 A.M., November 10, 1969.

On November 12, 1969, John Martinez was contacted by a Special Agent of the Federal Bureau of Investigation

by telephone at 870-6752, which is listed to John Martinez, 2812 Richfield Boulevard, in the current Central Telephone Company directory for Las Vegas, Nevada.

Martinez said he has been dealing cards for the past five or so months, first at the Bingo Club in downtown Las Vegas, and for the past few months at the Thunderbird Hotel. He presently works the 8:00 P.M. to 4:00 A.M. shift. The above telephone call was made at 11:15 A.M., and Martinez said he was just getting up.

/s/ John A. Norris, Jr., Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 25th day of November, 1969.

/s/ Roy Nelson
United States Commissioner

## APPENDIX F

18 USC 2516 and 2518 are as follows:

§ 2516. *Authorization for interception of wire or oral communications*

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the inforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any laws of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2518. *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be interpreted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the intercetpion is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral com-

munications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection

with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with the subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the

authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specifically designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in any such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any

wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for in-

spection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communications or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.